IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MONICA DINH, KHIRSTIE MATTA, KIMBERLY CHISHOLM, ALEXANDRA LEBLANC, KELLY ANDINO, ROSANA TURBAY, DANIELLE HENDERSON, AND KIMBERLY KOLBYE, on Behalf of Themselves and All Others Similarly Situated,	§	
PLAINTIFFS,	§	
VS.	§	**CIVIL ACTION NO.: 17-1276**
WERUNTEXAS, LLC d/b/a MERCY, WE RUN HOU, LLC d/b/a ENGINE ROOM, MOJEED MARTINS, JONATHAN REITZELL, AND STEVEN ROGERS,	§	
DEFENDANTS.	§	**JURY TRIAL DEMANDED**

PLAINTIFFS' ORIGINAL COLLECTIVE ACTION COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Plaintiffs Monica Dinh, Khirstie Matta, Kimberly Chisholm, Alexandra LeBlanc, Kelly Andino, Rosana Turbay, Danielle Henderson and Kimberly Kolbye on behalf of themselves and all other similarly situated employees, current and former ("Collective Action Members"), ask the Court to enter judgment against Defendants WERUNTEXAS, LLC d/b/a Mercy, WE RUN HOU, LLC d/b/a Engine Room, Mojeed Martins, Jonathan Reitzell, and Steven Rogers (collectively "Defendants").

SUMMARY

1. Congress enacted the Fair Labor Standards Act ("FLSA") to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." 29 U.S.C. § 202(a). To achieve its goals, the FLSA sets minimum wage and overtime pay requirements for covered employers. 29 U.S.C. 206(a), 207(a).

2. Collective Action Members are non-exempt employees who worked as cocktail waitresses serving customers at one or more bars owned and/or operated by Defendants.

3. Defendants violated the FLSA in three ways: a) by failing to compensate their cocktail waitresses, including Collective Action Members, the federally mandated minimum wage rate, b) by failing to pay their cocktail waitresses tips earned, and c) by paying their cocktail waitress' tips to managers and/or other non-tip eligible employees.

4. The FLSA requires Defendants to compensate non-exempt employees a statutory minimum hourly cash wage of at least $2.13 per hour exclusive of customers' tips. *See* 29 U.S.C. §§ 206(a), 203(m). Defendants did not.

5. The FLSA requires Defendants to pay non-exempt employees earned tips. *See* 29 U.S.C. §§206(a), 203(m). Defendants did not.

6. The FLSA requires Defendants to pay only tip-eligible employees from mandatory tip pools. *See* 29 U.S.C. §§ 203, 206. Defendants did not.

7. When Collective Action Members challenged Defendants about Defendants' FLSA violations, Defendants constructively terminated Collective Action Members' employment in violation of the anti-retaliation provisions of the FLSA. *See* 29 U.S.C. § 215(a)(3).

8. Collective Action Members bring this collective action for themselves and on behalf of similarly-situated employees, current and former, to recover unpaid wages and other penalties under the Act.

PARTIES AND PERSONAL JURISDICTION

9. Plaintiff Monica Dinh is an individual residing in Harris County, Texas. Defendants employed Ms. Dinh within the meaning of the FLSA. She attaches her written consent to this action as Exhibit "A" and incorporates it herein by this reference.

10. Plaintiff Khirstie Matta is an individual residing in Harris County, Texas. Defendants employed Ms. Matta within the meaning of the FLSA. She attaches her written consent to this action as Exhibit "B" and incorporates it herein by this reference.

11. Plaintiff Kimberly Chisholm is an individual residing in Harris County, Texas. Defendants employed Ms. Chisholm within the meaning of the FLSA. She attaches her written consent to this action as Exhibit "C" and incorporates it herein by this reference.

12. Plaintiff Alexandra LeBlanc is an individual residing in Harris County, Texas. Defendants employed Ms. LeBlanc within the meaning of the FLSA. She attaches her written consent to this action as Exhibit "D" and incorporates it herein by reference.

13. Plaintiff Kelly Andino is an individual residing in Harris County, Texas. Defendants employed Ms. Andino within the meaning of the FLSA. She attaches her written consent to this action as Exhibit "E" and incorporates it herein by reference.

14. Plaintiff Rosana Turbay is an individual residing in Harris County, Texas. Defendants employed Ms. Turbay within the meaning of the FLSA. She attaches her written consent to this action as Exhibit "F" and incorporates it herein by reference.

15. Plaintiff Danielle Henderson is an individual residing in Harris County, Texas. Defendants employed Ms. Henderson within the meaning of the FLSA. She attaches her written consent to this action as Exhibit "G" and incorporates it herein by reference.

16. Plaintiff Kimberly Kolbye is an individual residing in Clark County, Nevada. Defendants employed Ms. Kolbye within the meaning of the FLSA. She attaches her written consent to this action as Exhibit "H" and incorporates it herein by reference.

17. The Collective Action Members are former cocktail waitresses Defendants employed at any time up to and including three years prior to the date of filing of this suit.

18. Defendant WERUNTEXAS, LLC d/b/a Mercy (hereinafter referred to as "Mercy") is a Texas limited liability company that owns and operates Mercy nightclub located in Houston, Texas. Mercy is an employer under the FLSA and acted as such in relation to Collective Action Members. It may be served through its registered agent for service of process, Mojeed Martins, at 5757 Westheimer Road, Suite 3-120, Houston, Texas 77057, or wherever else he may be found.

19. Defendant WE RUN HOU, LLC d/b/a Engine Room (hereinafter referred to as "Engine Room") is a Texas limited liability company that owns and operates the Engine Room nightclub and other bars located in Houston, Texas. Engine Room is an employer under the FLSA and acted as such in relation to Collective Action Members. It may be served through its registered agent for service of process, Steven Rogers, at 2525 McCue, #522, Houston, Texas 77056, or wherever else he may be found.

20. Mojeed Martins ("Martins") is an individual, manager of Mercy, and was a manager of Engine Room, who owns an interest in and participates in the management of the various bars where Collective Action Members work. Martins is an employer under the FLSA and acted as

such in relation to Collective Action Members. He may be served with process at 1400 McKinney, Apt. 2609, Houston, Texas 77010, or wherever else he may be found.

21. Jonathan Reitzell ("Reitzell") is an individual, and was a manager of Mercy and Engine Room, who owns an interest in and participates in the management of the various bars where Collective Action Members work. Reitzell is an employer under the FLSA and acted as such in relation to Collective Action Members. He may be served with process at 1718 Stone Lake Drive, Missouri City, Texas 77489, or wherever else he may be found.

22. Steven Rogers ("Rogers") is an individual and a managing member of Engine Room, who owns an interest in and participates in the management of the various bars where Collective Action Members work. Rogers is an employer under the FLSA and acted as such in relation to Collective Action Members. He may be served with process at 8147 Long Point Road, Houston, Texas 77055.

SUBJECT MATTER JURISDICTION AND VENUE

23. The Court has jurisdiction over the subject matter of this action under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

24. Venue is proper in the Southern District of Texas because a substantial portion of the acts, conduct, and events forming the basis of this suit occurred in the Southern District of Texas, and all Defendants either reside or do business in the Southern District of Texas.

COVERAGE

25. At all material times, Defendants are or have been employers within the meaning of 29 U.S.C. §203(d), defined to include any person acting directly or indirectly in the interest of an employer in relation to an employee, because Defendants, on information and belief, had the power to hire or fire the Collective Action Members; to control their work schedules and their

conditions of employment; and to determine their rates of pay and method of payment. 29 U.S.C. § 203 (d).

26. At all material times, Defendants are or have been an enterprise, operating under a common business purposes, within the meaning of 3(r) of the FLSA. 29 U.S.C. § 203(r).

27. On information and belief, Defendants share employees, have a common management, pool their resources, have common ownership, and use many of the same employees to promote and advertise to bar customers. Defendants and their multiple bar locations (collectively, “Bars”) provide the same service to customers by using a set formula when conducting their business. Part of that set formula is the wage violation alleged in this Complaint. Thus, the Defendants formed a "single enterprise" and are each liable for the violations of the other.

28. Defendants formed a joint employment relationship with respect to the Collective Action Members. Defendants control and direct the Bars for whom Collective Action Members worked. Upon information and belief, Defendants did or do operate the Bars with centralized control of labor relations, common management, and a common business purpose to provide drinks and entertainment to customers for a profit. Defendants trained Collective Action Members, controlled the hours to be worked by Collective Action Members, and directed the work of Collective Action Members. Because Defendants' operations were unified and Defendants shared control over the work of the Collective Action Members, Defendants are each directly liable for the violations in this case.

29. At all material times, Defendants have been an enterprise in commerce or in the production of goods for commerce within the meaning of § 203(s)(1) of the FLSA because Defendants have had and continue to have employees engaged in commerce. 29 U.S.C. §

203(s)(1). At all material times, Defendants had and continue to have two or more employees who handled or sold "goods or materials that have been moved in or produced for commerce by any person." 29 U.S.C. § 203(s)(1)(A).

30. On information and belief, Defendants had and continue to have an aggregate annual gross business volume in excess of the statutory standard. 29 U.S.C. § 203(s)(1).

31. At all material times, Collective Action Members were individual employees who engaged in commerce or in the production of goods for commerce as required by 29 USC §§ 206 and 207.

32. On information and belief, Individual Defendants Martins, Reitzell, and Rogers had the authority to hire, fire, direct and supervise the work of Collective Action Members, the authority to expend funds and incur debt on behalf of the Bars, and the authority to make decisions regarding employee compensation. As such, pursuant to 29 U.S.C. § 203(d), Defendants Martins, Reitzell, and Rogers acted directly or indirectly in the interest of an employer in relation to Collective Action Members so as to render each of them individually liable under the FLSA.

FACTS

33. Defendants own and/or operate the Bars located in Houston, Texas where Collective Action Members worked.

34. Collective Action Members are former cocktail waitresses Defendants employed to work serving customers in the Bars.

35. As cocktail waitresses for Defendants, Collective Action Members' primary duties included, but were not limited to, providing bottle service to tables, opening and closing assigned locations, serving the customers, and promoting and marketing the Bars.

36. As a regular practice over the past, at least, three years, Defendants required Collective Action Members to participate in an aggregated tip pool.

37. As a result, Defendants failed to pay their cocktail waitresses, including Collective Action Members, any compensation, or if they did, Defendants paid them unfairly reduced tip distributions from the tip pool. Defendants' Bars paid Collective Action Members exclusively through tips and Defendants' Bars did not pay Collective Action Members minimum wage for any hours worked at the Bars.

38. On information and belief, managers at the Bars collected the tips Collective Action Members earned, along with the credit card receipts reflecting additional tips Collective Action Members earned, presumably counted same, and distributed purportedly all to Collective Action Members, but withheld a share of tips for themselves or other persons or entities who do not customarily and regularly receive tips. On information and belief, most or all of Defendants' managers followed this policy and appropriated a share of the tip pool to themselves and other entities or non-service employees who do not customarily or regularly receive tips or perform services that would result in them rightfully earning tips.

39. Defendants violated the FLSA's tipped-employee compensation provision, 29 U.S.C. § 203(m), which requires employers to pay a tipped employee a minimum wage of $2.13 per hour exclusive of tips. Defendants violated the FLSA, 29 U.S.C. § 203(m), by making invalid distributions from the tip pool to persons or entities, including managers, who do not customarily or regularly receive tips or perform services that would result in them rightfully earning tips.

40. Defendants violated the FLSA, 29 U.S.C. § 203(m), by failing to notify Collective Action Members in advance of Defendants' intention to take a tip credit in calculating Collective Action Members' wages to satisfy minimum wage requirements. Defendants failed to notify

Collective Action Members of the FLSA's requirements under 29 U.S.C. § 203(m) for a valid tip pool, including notifying each Collective Action Member:

a. the amount of the cash wage that the employer is to pay to the tipped employee;

b. the additional amount by which the wages of the tipped employee are increased on account of the tip credit the employer claims, which amount may not exceed the value of the tips the employee actually receives;

c. that the affected employee must retain all tips the tipped employee receives except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips or who perform services that would rightfully entitle such employee to earn tips; and

d. that the employer may not apply the tip credit to any employee who it has not informed of these requirements set forth above.

29 U.S.C. § 203(m); 29 C.F.R. § 531.59.

41. Because Defendants failed to comply with 29 U.S.C. § 203(m), Defendants were and are not eligible to take the tip credit; and therefore, they did not compensate Collective Action Members at the federally-mandated minimum wage rate.

42. Defendants employed Collective Action Members as non-exempt employees. Collective Action Members worked as cocktail waitresses the Bars until Defendants constructively terminated them from employment for questioning Defendants about the legality of the tip pooling and compensation practices, and also by Defendants' failure to pay the Collective Action Members. Defendants knew or should have known that their policies and practices violated the FLSA, and they did not make a good faith effort to comply with the FLSA. Instead, Defendants acted knowingly, willfully, and/or with reckless disregard of the law by (a) failing to pay Collective Action Members the required minimum cash wage of $2.13 per hour; (b) appropriating to managers, other entities, and/or themselves a portion of the tip pool; (c) failing to pay Collective Action Members earned tips; and (d) terminating or constructively

terminating the Collective Action Members when each of them asserted or inquired about her rights under the FLSA.

COLLECTIVE ACTION ALLEGATIONS

43. Collective Action Members incorporate by this reference paragraphs 1- 42 above as if fully set forth herein.

44. Collective Action Members have actual knowledge that Defendants did not pay the other Collective Action Members the federally mandated minimum wage. Defendants paid [or did not pay] the other Collective Action Members in the same manner in violation of the FLSA.

45. Collective Action Members are tipped employees who Defendants employed and did not pay at the federally mandated minimum wage rate.

46. Defendants required Collective Action Members to participate in an invalid tip pool, failed to pay the required cash wage of $2.13 per hour, and improperly appropriated to managers and/or themselves tips from the tip pool belonging to Collective Action Members.

47. The Collective Action Members performed the same or similar work and are not exempt from the requirement that Defendants pay them at least the minimum wage rate of $2.13 per hour under the FLSA. As such, Collective Action Members are similar in terms of job duties, pay structure, lack of pay and other unlawful treatment under the FLSA.

48. Defendants' failure to pay the minimum wage required by the FLSA results from generally applicable policies or practices, and does not depend on the personal circumstances of a particular Collective Action Member.

49. Defendants treated Collective Action Members typically and equally in violation of the FLSA.

50. Collective Action Members' specific job titles and precise job responsibilities merit collective treatment under the FLSA.

51. Collective Action Members, irrespective of their particular job requirements, are entitled to compensation for hours worked at the federally mandated minimum wage rate.

52. Although the exact amount of damages may vary among Collective Action Members, the damages are easily calculated by simple formula. The claims of all Collective Action Members arise from a common nucleus of facts. Liability is based on a systematic course of Defendants' wrongful conduct that caused harm to all Collective Action Members equally.

53. The proposed Collective Action Members constitute a group so numerous that joinder of all Members is impracticable. Collective Action Members would be unlikely to file individual suits because they lack adequate resources, access to attorneys, or an adequate understanding of their rights or claims.

54. Collective Action Members will fairly and adequately protect the interests of their fellow Collective Action Members. Neither Collective Action Members nor their counsel will have undue difficulty managing the action as a collective action.

55. Questions of law and fact common to Collective Action Members predominate over questions that may affect only individuals because Defendants have committed the same or sufficiently similar acts against each Collective Action Member.

56. Among the questions of law and fact common to Collective Action Members are:

a. whether Defendants employed Collective Action Members within the meaning of the FLSA;

b. whether Defendants informed Collective Action Members that Defendants intended to take a tip credit to meet the minimum wage requirements;

c. whether Defendants required Collective Action Members to participate in "tip pooling" or sharing tips;

d. whether Collective Action Members retained all the tips they received, except those tips included in a tipping pool among employees who customarily and regularly receive tips or provide services that would typically result in their receiving tips;

e. whether Defendants' employees who do not perform services that would result in their customarily and regularly receiving tips retained any tips that Defendants owed to Collective Action Members;

f. whether Defendants failed to pay Collective Action Members for all of the hours they worked and/or the statutory minimum wage and/or overtime compensation for hours worked in violation of the FLSA and the regulations promulgated thereunder;

g. whether Defendants' FLSA violations are or were willful as that term is used in the FLSA; and

h. whether Defendants are liable for the damages Collective Action Members claim in this case, including but not limited to compensatory, punitive, statutorily-enhanced damages, liquidated damages, interest, costs, expenses, and reasonable and necessary attorneys' fees.

57. As such, the class of similarly situated Collective Action Members is properly defined as follows:

> ***The Collective Action Members are all persons Defendants employ or employed who customarily and regularly received or receive tips as cocktail waitresses at any time during the three-year period before the filing of this Complaint up to the present.***

VIOLATION OF 29 U.S.C. § 206

58. Collective Action Members incorporate by this reference paragraphs 1- 57 above as if fully set forth herein.

59. Defendants did not pay Collective Action Members $2.13 per hour pursuant to a valid tip pool arrangement. Other than through the invalid tip pool, Defendants did not compensate Collective Action Members for any hours they worked.

60. Defendants' practice of failing to pay Collective Action Members at the required minimum wage rate violates the FLSA, 29 U.S.C. § 206.

61. None of the exemptions the FLSA provides regulating the duty of employers to pay employees for all hours worked at the required minimum wage rate apply to the Defendants or the Collective Action Members in this case.

VIOLATION OF 29 U.S.C. § 211(c)

62. Collective Action Members incorporate by this reference paragraphs 1- 61 above as if fully set forth herein.

63. Upon information and belief, Defendants failed to keep adequate and accurate records of Collective Action Members' work hours and pay in violation of the FLSA, 29 U.S.C. § 211(c).

64. Federal law mandates that an employer is required to keep for three (3) years all payroll records and other records containing, among other things, the following information:

a. The time of day and day of week on which the employees' work week begins;

b. The regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the FLSA;

c. An explanation of the basis of pay by indicating the monetary amount paid on a per hour, per day, per week, or other basis;

d. The amount and nature of each payment which, pursuant to section 7(e) of the FLSA, is excluded from the "regular rate;"

e. The hours each employee worked each workday and total hours each employee worked each workweek;

f. The total daily or weekly straight time earnings or wages due for hours each employee worked during the workday or workweek, exclusive of premium overtime compensation;

g. The total premium Defendants paid each employee for overtime hours each employee worked, excluding the straight-time earnings for overtime hours Defendants record under this section;

h. The total amount Defendants added to or deducted from wages they paid each employee each pay period. including employee purchase orders or wage assignments;

i. The dates, amounts, and nature of the items Defendants added or deducted;

j. The total wages Defendants paid each employee each pay period; and

k. The date Defendants paid each employee and the pay period covered by such payment.

29 C.F.R. 516.2, 516.5.

65. Defendants have not complied with federal law and have failed to maintain required records with respect to Collective Action Members. Nevertheless, Collective Action Members can meet their burden under the FLSA by proving that they, in fact, performed work for which they were not properly compensated, and can produce sufficient evidence to show the amount and extent of the work "as a matter of a just and reasonable inference." *See, e.g., Anderson v. Mt. Clemens Pottery Co.*¸ 328 U.S. 680, 687 (1946).

VIOLATION OF 29 U.S.C. § 215(a)(3) — RETALIATION

66. Collective Action Members incorporate by this reference paragraphs 1- 65 above as if fully set forth herein.

67. The FLSA prohibits employers from discharging or in any other manner discriminating against any employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under or related to the FLSA, or has testified or is about to testify in a proceeding.

68. Collective Action Members approached Defendants about the invalidity of the tip pool and complained about receiving less than legal minimum wage. Defendants subjected them to an adverse employment action by failing to pay them in accordance with the FLSA, or at all, and in effect constructively terminated them.

69. Collective Action Members' communications with Defendants regarding their rate of compensation and the impropriety of Defendants' deductions from the mandatory tip pool, constituted protected activity under the anti-retaliation provisions of the FLSA. The communication was either the protected act of initiating a claim or, alternatively, the necessary precursor to the protected act of filing a claim. *See generally*, *Hagan v. Echostar Satellite, L.L.C. et al.*, 529 F.3d 617, 625-26 (5th Cir. 2008); *Dearmon v. Tex. Migrant Council, Inc.*, 252 F. Supp.2d 367, 367-68 (S.D. Tex. 2003); *see also* 29 U.S.C. § 215(a)(3). As a result, Collective Action Members suffered adverse employment consequences, including termination, constructive termination, or a reduction in shifts or hours. Defendants' imposition of the adverse employment consequences constitutes illegal retaliation under the FLSA.

WAGE DAMAGES SOUGHT

70. Collective Action Members incorporate by this reference paragraphs 1- 69 above as if fully set forth herein.

71. Collective Action Members are entitled to recover compensation for the hours they worked for which they were not paid at the federally mandated minimum wage rate. 29 U.S.C. § 216(b).

72. Collective Action Members are also entitled to recover all of the misappropriated tips Defendants deducted from the mandatory tip pool.

73. Collective Action Members are also entitled to an amount equal to all of their unpaid wages and the misappropriated funds as liquidated damages. 29 U.S.C. § 216(b).

74. Collective Action Members are entitled to recover the compensation they would have received at the federally-mandated minimum wage rate plus their regular rate of tips from the

time each suffered an adverse employment action through entry of judgment in this matter (i.e. "front pay"). 29 U.S.C. § 216(b).

75. Collective Action Members are entitled to recover their attorney's fees and costs. 29 USC § 216(b).

JURY DEMAND

76. Collective Action Members demand trial by jury on all issues.

PRAYER

77. **For these reasons**, Collective Action Members, on behalf of themselves and all those who consent to opt-in as Collective Action Members, respectfully request that the Court enter judgment in their favor against Defendants, jointly and severally, as follows:

a. Unpaid wages which accrued as a result of Defendants' failure to pay the federally-mandated minimum wage rate in violation of the FLSA;

b. Unpaid wages which accrued as a result of Defendants' failure to compensate Collective Action Members for tips they earned;

c. All tip pool money misappropriated by Defendants and/or their managers;

d. Compensation to Collective Action Members at the regular rate of pay, including tips, they would have received from Defendants had they not been constructively terminated from their employment and illegally denied shifts from the time of constructive termination through entry of judgment in this matter (i.e. "front pay");

e. An amount equal to the sum of all of the above as liquidated damages for Defendants' violation of the minimum wage and anti-retaliation provisions of the FLSA;

f. Reasonable attorney's fees, costs and expenses as provided for by the FLSA;

g. All other relief to which Collective Action Members may be entitled.

Respectfully submitted
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